SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 132

OLLIE OTTO PRINCE,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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PETITION NOT PRINTED

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I

Official Report of Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in 230 F. 2d 568. The opinion is printed in full in the record (R. 8).

II

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

III

Statutes Involved

12 U.S.C. Sec. 588b (1946 Ed. Vol. 1, p. 1063:

(a) "Whoever, *by force and violence,* or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

(b) "Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 or more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both."

(c) "Whoever shall receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value, knowing the same to have been taken from a bank in violation of subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

18 U.S.C. Sec. 2113 (1952 Ed. Vol. 2, pp. 2466-2467):

(a) "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

(b) "Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the

care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

(c) "Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker."

(d) "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years or both."

(e) "Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct."

(f) "As used in this section the term 'bank' means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

(g) "As used in this section the term 'savings and

loan association' means any Federal savings and loan association and any savings and loan association the accounts of which are insured by the Federal Savings and Loan Insurance Corporation."

IV

Questions Presented for Review

1. Did the United States District Court for the Western District of Texas err in sentencing petitioner to consecutive sentences of twenty (20) years and fifteen (15) years on the two counts of the indictment herein involved?

2. Did said District Court err in refusing to vacate, expunge and set aside the Fifteen (15) year sentence imposed on Count Two of said indictment?

3. Did the United States Court of Appeals for the Fifth Circuit err in affirming the judgment of the trial court overruling petitioner's Motion to Modify or Correct Illegal Sentence?

4. What is the maximum sentence imposable under the indictment involved herein?

5. When Congress passed the 1937 amendment to the Bank Robbery Act, did it intend to widen the scope of the Act to encompass peaceable entry of a bank building with intent to commit a felony or larency therein?

V

Statement of the Case

The question presented for review in this case is whether the trial court erred in overruling petitioner's Motion to Vacate or Correct Illegal Sentence. The precise question is whether the trial court had the power to impose upon the petitioner a sentence of imprisonment for a term of twenty (20) years on the first count of the indictment charg-

ing commission of the crime of bank robbery under aggravated circumstances, and in addition thereto, to fifteen (15) years on the second count of said indictment charging entering a bank with intent to commit a felony therein, the second sentence to be served upon the expiration of the first, or an aggregate sentence of thirty-five (35) years.

In March, 1949, the Federal Grand Jury, meeting at San Antonio, Texas, indicted petitioner. The indictment was in two counts as follows:

> "The grand jury charges: On or about October 5, 1948, in Hill County, Texas, within the Waco Division of said District, OLLIE OTTO PRINCE, by intimidating Guy Mann, feloniously took from the presence of the said Guy Mann Fifteen Thousand Seven Hundred Sixty-four ($15,764.00) Dollars in money, which said money then belonged to the Malone State Bank of Malone, Texas, and which said bank was then a banking association incorporated under the laws of the State of Texas, and was then an insured bank within the meaning of the provisions of Section 264, Title 12, United States Code, relating to Federal Deposit Insurance Corporations, and in committing the offense above described, the said OLLIE OTTO PRINCE put the life of Guy Mann in jeopardy by use of a dangerous weapon, to-wit: a pistol."
>
> SECOND COUNT
>
> "At the time and place and within the jurisdiction, all as described in the First Count hereof, OLLIE OTTO PRINCE entered the bank described in said First Count, with intent to commit therein a felony, to-wit: a robbery."
>
> (R. 1)

The first count charged violation of 18 U.S.C. Sec. 2113 (d). The second count charged violation of 18 U.S.C. Sec. 2113 (a).

Trial was had and a verdict returned by the jury on November 22, 1949, finding petitioner guilty of both counts. On said date he was sentenced by the trial court to twenty (20) years on the first count and fifteen (15) years on the second count of said indictment, the fifteen (15) year sentence to begin upon the expiration of the sentence imposed on the first count.

On June 24, 1955, petitioner filed his Motion to Vacate or Correct Illegal Sentence in the sentencing court, the United States District Court for the Western District of Texas, contending that the sentence was imposed in violation of the Constitution and laws of the United States; that the trial court was without jurisdiction to impose the sentence; and that the sentence was in excess of the maximum allowed by law in that 18 U.S.C. Sec. 211 provides a maximum punishment of twenty-five (25) years for the offense for which this petitioner was convicted, whereas petitioner was sentenced on two counts of twenty (20) years and fifteen (15) years, respectively, to run consecutively, or for a total of thirty-five (35) years (R. 5).

On the 27th day of July, 1955, the trial court entered an order overruling the motion (R. 6).

On August 4, 1955, petitioner filed his notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit (R. 6). On February 29, 1956, the order of the trial court was affirmed (R. 8).

A petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit was thereafter filed with this Court. Certiorari was granted on June 4, 1956.

VI

Summary of Argument

Point A

The recommendations of the Attorney General, the Senate and House reports, the debate thereon, and a fair reading of the statute commonly known as the Bank Robbery Act, as amended, and the reenactment thereof, are strongly indicative of Congressional intent to include the crime of burglary in the 1937 amendment to the statute (Act of August 24, 1937, Ch. 747, 50 Stat. 749) which added the offense of entering a bank building with intent to commit a felony or larceny therein. Mere entry, not under burglarious circumstances, or in any manner evidencing a breaking or entering, as in the case at bar, is not a crime intended to be punished under the amendment, so as to empower the trial court to impose a separate sentence thereon.

Point B

The entrance with intent amendment, seemingly selective because of its legislative history, appears to limit its application to burglary, however, because of its phraseology, has been interpreted to cover the situation when one entering a bank building with intent to rob by force or violence, or to steal from the bank, but after such entry either abandons his purpose, or is apprehended before he can consummate the unlawful enterprise. However, if the felon consummates the intent and commits the intended act made criminal by the statute, he can only be punished for the consummated act. The intent count is deemed merged into the count charging the completed act.

Point C

Congress, prior to the 1937 amendment, provided for a maximum sentence of twenty-five (25) years for the acts prohibited in 12 U.S.C. 588b (a) and (b), the predecessor statute. The amendment was not intended to provide for a more severe sentence for the crime of bank robbery, but to expand its scope so as to include burglary and larceny; burglary being construed to include entry not under the usual burglarious circumstances, i.e., breaking and entering. When the entry with intent consummates in the actual robbery by force and violence, or in robbery under aggravated circumstances, as in the case at bar, and prohibited in subsection (a) and (b) of the original act and subsections (a) and (d of the reenactment, the intent count of the indictment is merged therein, Congress not being deemed to have manifested an intention to provide more than twenty-five (25) years punishment as the maximum imposable under these subsections. In the case at bar, Count Two of the indictment, the entry with intent count, merged in Count One thereof, the aggravated circumstances count, so as to empower the court to impose a maximum sentence of twenty-five (25) years only on the indictment.

Point D

Whether or not it is deemed that Congress did not intend the 1937 amendment containing the entry with intent provision to cover only crimes in the nature of the traditional burglary, i.e., breaking and entering, nevertheless, the court erred in imposing a sentence under each count of the indictment to be served consecutively, in that no sentence should have been imposed on the second count. The robbery of the bank did not constitute two separate crimes for the purpose of punishment, the entrance with intent count of the

indictment necessarily being merged in the aggravated count, since proof of the robbery under the aggravated circumstances alleged in Count One of the indictment necessarily included all proof necessary to prove the entry with intent charged in Count Two thereof. Proof of violation of the entry of intent provision of the amendment did not require proof of any additional facts.

VII

Argument

Point A

The Congress, in enacting the 1937 amendment to the Bank Robbery Act, which included the entry of a bank or savings and loan association with intent to commit a felony or larceny, intended this offense to be in the nature of a burglary. Mere entry, not under burglarious circumstances, or in any manner evidencing a breaking or entering, is not a separate and distinct crime from actual consummation of the typical bank robbery, or bank larceny, as in the case at bar, so as to empower the trial court to impose a separate sentence thereon.

This case involves interpretation of the federal statute commonly called the Bank Robbery Act, 18 Y.S.C. Sec. 2113. It will be noted that petitioner has also set out the text of 12 U.S.C. Sec. 588b, also known as the Bank Robbery Act, now repealed.

The latter statute was enacted in 1934, Act of May 18, 1934, Ch. 304, 48 Stat. 783; the former in 1948, Act of June 25, 1948, Ch. 645 62 Stat. 796. The 1948 statute is substantially a reenactment of the former statute, consolidating and slightly modifying the earlier act. As the Court of Appeals pointed out in its opinion below, nothing in the reenactment affects the questions involved in this case (R.

9). House Report 304 of the Eightieth Congress, page A-135, also supports this view.

The offense charged in the second count of the indictment was not made a crime by the Act of 1934 which originally established the federal offense of bank robbery. The provision making entry of a bank with intent to commit a felony therein a crime was added by the Act of August 24, 1937, Ch. 747, 50 Stat. 749. The added provision became part of subsection (a) of the earlier statute and also part of subsection (a) of the reenactment. The language of the latter statute is substantially the same as that of the original amendment.

The question posed is: Did the Congress, when it passed the amendment to the earlier statute, now embodied in the later statute, intend to make mere entry *per se* of a bank, as part of a plan to commit armed robbery therein, a single and separate offense so that the crime of bank robbery, in effect, is divided into two separate stages, permitting a separate sentence on each phase of the offense?

Stated in a different manner, suppose a person walks into a bank with intent to rob it, and uses a dangerous weapon while he is engaged in the unlawful entry, robs the bank, but is apprehended before he makes his escape! Has he committed one crime or two? Is the entry of a bank a separate and distinct crime from the actual bank robbery, or is it part of the same transaction and not a crime in itself under the circumstances? Did the Congress intend separate punishment for these acts so that a person committing them can be sentenced to a total of twenty (20) years for each act if not committed under aggravated circumstances, or a maximum of twenty-five (25) years for each act if committed under aggravated circumstances as set out in subsection (d) of the reenactment and subsection (b) of the original statute? Or did the Congress intend

the entry with intent amendment to cover offenses other than walking into a bank intending to commit a felony therein and consummating the intent?

The last question particularly must be answered in the affirmative when the legislative history of the amendment is examined.

Under the facts of the case at bar, the petitioner entered the Malone State Bank, Malone, Texas, just before noon on the 5th day of October, 1948, and during its regular banking hours. He came in through the bank's side entrance, asked certain directions, and then displayed a revolver and consummated the act of bank robbery under the aggravated circumstances charged in Count One of the indictment. (Supp. Rec.) Petitioner is now serving the twenty (20) year sentence imposed on that count.

However, when the history and purpose of the amendment is considered, can it be said that he had already consummated one crime, that set out in Count Two of the indictment, when he made his entrance into the bank so as to justify the imposition of an additional fifteen (15) year sentence to be served upon the expiration of that sentence imposed in Count One? Petitioner earnestly submits that a negative answer must be given to this query.

The Attorney General of the United States sent the following letter, dated March 17, 1937, to the Honorable William B. Bankhead, Speaker of the House of Representatives:

OFFICE OF THE ATTORNEY GENERAL
Washington, D. C., March 17, 1937.

Hon. William B. Bankhead,
The Speaker, House of Representatives, Washington, D. C.

My Dear Mr. Speaker: The act of May 18, 1934 (48 Stat. 783; U.S.C., title 12, secs. 588a to 588d), penalizes robbery of a national bank or a member bank of the

Federal Reserve System. The class of banks protected by this statute was enlarged by section 333 of the act of August 23, 1935 (49 Stat. 720), to include all banks insured by the Federal Deposit Insurance Corporation.

The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting any one in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.

The enclosed bill which has been drafted in this Department proposes to amend subsection (a) of section 2 of the above-mentioned statute so as to include within its prohibitions, the crimes of burglary and larceny of a bank covered by its provisions.

I am informed by the Acting Director of the Bureau of the Budget that this legislation is not in conflict with the program of the President and I recommend its enactment.

Sincerely yours,

HOMER S. CUMMINGS,
Attorney General.

H. R. 732, 75th Congress, 1st Session.

The law existing at the time was set out in the report, page 2, with the proposed amended portions printed in italics:

> "(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; *or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny; or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank,* shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

It will be noted that the recommended words "or whoever shall enter or attempt to enter any bank, or any building, used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny;" were embodied in and made a part of the amendment that was finally passed. The other recommended language was adopted in substantially the form recommended by the Attorney General. Since the Attorney General points out that the original act did not include larceny and burglary, a fair reading of the amendment clearly indicates that the first portion is directed at the crime of burglary and the second portion at the crime of larceny. A vivid and somewhat bizarre example of the law's lack of all-inclusiveness, in so far as larceny is concerned, being given in the letter.

The caption of the report, submitted by the Committee on the Judiciary, is as follows:

"AMEND THE BANK-ROBBERY STATUTE TO INCLUDE BURGLARY AND LARCENY"

The Committee reported the bill (H.R. 5900) favorably and concurred with the Attorney General's recommendations. In the body of this report, page 1, the following is found:

> "The Attorney General has recommended the enactment of this proposed legislation which is designed to enlarge the scope of the bank robbery statute, enacted in 1934, (48 Stat. 783; U.S.C., title 12, sec. 588b) to include larceny and burglary of the banks protected by this statute. * * * Your committee concurs in this recommendation."

The following debate is reported in the *Congressional Record*, House, Vol. 81, May 17, 1937, at page 4656:

AMENDMENT OF BANK ROBBERY STATUTE

The Clerk called the next bill, H. R. 5900, to amend the bank-robbery statute to include burglary and larceny.

The SPEAKER. Is there objection to the present consideration of the bill?

Mr. WOLCOTT. Mr. Speaker, reserving the right to object, in reading the bill it seems to me this puts simple larceny on the same plane as robbery and breaking and entering in an attempt to commit larceny. It seems to me a distinction should be made between simple larceny within the building and robbery.

Mr. RANKIN. Will the gentleman yield?

Mr. WOLCOTT. I yield to the gentleman from Mississippi.

Mr. RANKIN. How are you going to tell what a thief is going to do when he gets into a bank? If a man breaks into a house or bank he will kill anyone in it to carry out his purpose.

Mr. WOLCOTT. If the gentleman will read the bill and report, he will see that it not only punishes for robbery which is putting in fear, and *breaking and entering* (emphasis mine), but the larceny of anything within the bank, whether the man is there lawfully or not. If a man should go into a bank to make a deposit and pick up a pencil and walk out with it he would be on the same plane, according to this bill, as a man who deliberately broke in during the nighttime and committed larceny. I know the gentleman does not agree with that.

Mr. RANKIN. I do not, but if a man breaks into a house he is going to commit a crime.

Mr. WOLCOTT. There is no question about that. *Breaking and entering is a crime in and of itself.* (emphasis mine)

Mr. Speaker, I ask unanimous consent that this bill may be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Michigan (Mr. Wolcott)?

There was no objection.

In Vol. 81, page 5376, of the *Congressional Record*, House, for June 7, 1937, the bill again is referred to as "* * * H. R. 5900, to Amend the Bank-Robbery Statute to Include Burglary and Larceny."

The Senate Committee on the Judiciary recommended the bill be passed as recommended by the Attorney General in S. R. 1259, Seventy-fifth Congress, First Session. On page 1 thereof the letter from the Attorney General, here-

tofore mentioned, was set out in full, as is the House Report numbered 732, both of which refer to the amendment as enlarging the scope of the Bank Robbery Statute to include larceny and burglary.

The legislative intent is clear that simple larceny was to be brought within the purview of the statute, as well as burglary.

In the 81 Cong. Rec. excerpt, supra, it will be noted that Mr. Wolcott refers to *breaking and entering* no less than three times. Mr. Rankin makes similar observations. There seems no question that they were debating the entry with intent provision on the premise that it was designed to enlarge the scope of the Act to cover burglaries in the traditional meaning of the crime. Read in conjunction with the letter of the Attorney General and the proposed amendment which he submitted, and which contained the same words embodied in the amendment as passed with the exception of the word, "depredation", for which the word, "felony" was substituted, and the House and Senate reports which concurred in the Attorney General's recommendations, little doubt remains of the Congressional intent—to add the crime of burglary in its generally understood meaning to the Act.

Burglary has been defined as breaking and entering the house of another in the nighttime, with intent to commit a felony therein, whether the felony is actually committed or not. Black's *Law Dictionary*, page 259, *Benson vs. McMahon*, 127 U. S. 457, 8 S. Ct. 1210, 32 L. Ed. 234. The crime has been expanded by legislation to include other buildings, or parts thereof, and daytime break-ins.

Words are to be construed, if reasonably possible, so as to effectuate the purpose and intent of the lawmakers, and the meaning of words in a particular instance is de-

termined, not only by a consideration of the words themselves, but by also considering the purpose of the law and the circumstances under which they are employed. *Puerto Rico vs. Shell Company,* 302 U. S. 253, 258, 58 S. Ct. 167, 82 L. Ed. 235; *Hudspeth vs. Melville,* 127 F. 2d 373, 377 (C.A. 10).

Furthermore, without exception, it is held that a penal statute must be strictly construed. *United States vs. Reece,* 92 U.S. 214, 219, 23 L. Ed. 563; *United States vs. Wiltberger,* 5 Wheat 76, 85, 5 L. Ed. 37. As Justice Huxman observed in the *Melville* case:

> "Nothing is a crime unless specifically made so by statute. Crimes do not arise by implication. This is a cardinal principle of our system of jurisprudence—an inviolate safeguard that we have thrown around the individual to protect his life, liberty and freedom."

Further, as Justice Frank points out in *United States vs. Jerome,* 130 F. 2d 514 (C.A. 2), this is a penal statute, and should not, by construction, be generously construed in favor of the Government.

Another persuasive factor is the heavy penalty, to-wit: twenty (20) years, provided as the maximum assessable under the entry provision. Burglary is traditionally a serious crime, and the penalty is in harmony with this tradition. However, it is inconceivable that if a man enters a bank intending to commit petit larceny, which carries a penalty of not more than one (1) year, he can be sentenced to twenty (20) years if he abandons his purpose after entry, or if no merger was had, to a total maximum sentence aggregating twenty-one (21) years if the overt acts of attempt or actual larency are proved. Carrying this argument further, grand larency may involve hundreds of thousands of dollars. The maximum penalty is ten (10) years.

Is entry with intent deemed a more serious crime: It does not appear so unless it is deemed to be in the nature of burglary.

Of further interest is that if peaceable entry with intent is intended, a person may enter the bank to commit petit larceny, which is the obvious meaning of the term in the amendment, since grand larceny must necessarily be embraced within the meaning of the term "felony". He thus may be committed for a felony because he entered with intent to commit a misdemeanor.

Since the reenactment, for all practical purposes, is a duplication of the original amendment, the intent of the Congress must be reflected in any judicial interpretation of same. There is nothing in the legislative history of the reenactment indicating the slightest intent to deviate from the clear purpose of the 1937 amendment as reflected in the above letter, recommendations, submitted bill, debates, and Senate and House reports hereinabove set out.

Petitioner did not commit the crime of burglary. Judicial legislation must not charge him with an offense of which he is innocent. Count Two of the indictment should be set aside as void.

Point B

The 1937 amendment was designed and intended to include larceny and burglary of the banks protected by the Act. The inference is strong from the legislative history of the Act that Congress intended to expand its purview to include both larceny and burglary. The proceedings and reports do not make any attempt to broaden the scope of the Act beyond the above additions. However, it is recognized that the entry with intent provision contains phraseology not particularly conducive to a narrow interpretation of the acts prohibited by it so that breaking and entering with felonious intent, the traditional concept of the act of burglary, excludes peaceable entrance with intent to commit a felony or larceny within the bank building.

As Justice Frank observed in his dissenting opinion in *United States vs. Jerome,* 130 F. 2d 514 (C.A. 2), later reversed in *Jerome vs. United States,* 318 U. S. 101, 63 S. Ct. 483, 87 L. Ed. 640:

> "The second change made it a federal crime to enter or attempt to enter a bank with intent to commit such a federal felony or federal larceny. And such an entry was constituted a federal crime whether peaceably made or by breaking in; it thus includes burglary of a bank, i.e., breaking and entering with a felonious intent."

Congress adopted the language:

> "Whoever enters * * * with intent to commit * * * any felony or larceny, * * *"

It can be and has been interpreted to indicate an intent to expand the scope of the Act beyond the usual burglary concept in order to make criminal peaceable entry with intent.

See also dissenting opinions by Justice Huxman in *Hudspeth vs. Melville,* 127 F. 2d 373 (C.A. 10); *Hudspeth vs. Tornello,* 128 F. 2d 173 (C.A. 10). It is pointed out that Justice Frank, in his own dissenting opinion in the *Jerome* case, refers to the opinions of Justice Huxman in the *Melville* and *Tornello* cases and observes that he, in general, is in agreement with them. The position adopted by Justices Frank and Huxman were sustained by this court in *Jerome vs. United States, supra.* Although a different point was involved in these cases, namely, whether or not the word "felony" and the entry with intent provision was intended to include state felonies or only those felonies prohibited by the Act, it was deemed necessary by the courts in these cases to trace the history of the Bank Robbery Act and define its purposes. The conclusion was reached that the amendment was intended to cover not only the breaking and entering concept of burglary, but entry not involving force or overt act. As the Court of Appeals for the Tenth Circuit stated in *Rawls vs. United States,* 162 F. 2d 798, on page 799:

> "Such subsection, as amended, creates and defines four separate and distinct offenses, the first is an offense in the nature of robbery. The second is an offense in the nature of burglary, entry of a bank with intent to commit a felony or larceny therein, except that forcible entry is not made an element. The third and fourth are offenses in the nature of grand and petit larceny."

See also *Alford vs. United States,* 113 F. 2d 885 (C.A. 10).

The opinion of these courts and the legislative history of the amendment are strong evidence of whether the entry with intent provision, which may have a purpose wider in

scope than the traditional concept of burglary, was designed to add an additional feature to the Act so as to enable a more severe punishment to be imposed for violations, or whether it was enacted to broaden the scope of the Act to include offenses not then within its purview and thus seriously hampering its enforcement by law officers. It is submitted that there is little doubt that effectuating the latter purpose was the moving force behind the enactment.

The Attorney General in his letter to the Speaker of the House, supra, pointed out the necessity of amending the Act and cited an instance where a man had walked out of a bank with a large sum of money obtained under larcenous circumstances only, and not covered by the original Act. The Act at the time provided only for the offense of robbery by force and violence, aggravated or not aggravated. He desired widening the scope of the Act to include other offenses which may arise affecting banks. Nowhere in the legislative history is there a hint or scintilla of evidence that he or Congress was dissatisfied with the penalties already assessable thereunder, which were twenty (20) years for robbery by force and violence, and twenty-five (25) years if committed under aggravated circumstances. The Attorney General wanted assurance that there would be no reoccurrence of the striking example described in his letter.

Congress heeded his request. Justice Frank in the *Jerome* case sums it up as follows:

> "The legislative history shows that the congressional purpose in adopting these 1937 amendments was to add, to the existing federal crime of bank robbery, (a) the federal crimes of felonious stealing from and petit larceny from a bank; (b) the federal crime of burglary of a bank; and (c) the federal crime of peace-

ably entering a bank with the intent thus to steal bank property."

It is submitted that Congress did not intend to add additional punishment to the Act by these amendments. As Justice Huxman observed in *United States vs. Melville*, supra, and urged by petitioner in the court below, the entry of intent count supplies the omission in the following instance: Suppose one enters a bank with the intent to rob by force or violence or to steal from the bank, but after entrance abandons such intent, or is apprehended before he commits the actual robbery or theft without any overt act that can be classified as an attempt. Congress is deemed to have intended that these acts be punished, but if the man consummated his intent and committed the intended act, would not the imposition of sentence on the consummated act, namely, bank robbery or theft, be what Congress intended, or would the trial judge be empowered to impose two separate sentences?

In view of what has been stated, it is urged that neither Congress nor the Attorney General were concerned over the status of this fact structure. The Act amply provided for punishment under subsections (a) and (b) of the original act, and still provides the same punishment under subsections (a) and (d) of the reenactment. No pyramiding or aggregating of sentences was contemplated or intended. The entry merged in the consummated act so as to empower the court to impose one sentence.

Petitioner is acutely aware of the fact that the crime of burglary *per se* does not necessarily merge into the culminated act. As pointed out in *United States vs. Jerome*, supra, in a footnote on page 524:

"In a sense, the crime of burglary is itself a crime, which consists of an attempt to perform another crime;

for burglary is breaking and entering with the intent to do an unlawful act and is punishable whether or not that other act is performed."

Petitioner's research has failed to disclose any cases where an indictment involving federal bank robbery contained a count charging burglary in the traditional style. There appears to be no precedent.

However, in the case at bar, the elements of the crime of burglary are conspicuously absent since the petitioner walked in a regular entrance during regular banking hours, performed the prohibited acts under aggravated circumstances, and then left. (Supp. Rec.) He is liable to a maximum sentence of twenty-five (25) years.

There is a vast difference between peaceable entry and that perpetrated under burglarious circumstances. This distinction was noted in *United States vs. Jerome,* supra. It is inconceivable that if Congress wanted to cover peaceable entry with intent so that perpetrator thereof would not escape punishment, it further intended that peaceable entry carry an additional sentence if the entry culminates in the offense intended.

If this Court approves the practice of pleading a count charging entry with intent in addition to a count charging the consummated intended act, an indispensable weapon has been given the alert and astute prosecutor in that he can be assured of two sentences for the typical bank robbery, as in the case at bar. Every indictment charging bank robbery by force and violence, aggravated or not aggravated, if it is properly drawn, will, by judicial fiat, contain a minimum of two counts—and thus subject the defendant to an automatic imposition of two sentences. In practically all of the cases cited herein and arising under the Bank Robbery Act, the defendant would be eligible for the additional sentence.

This is the dilemma of petitioner. It is submitted that the entry of intent count numbered two, under the peaceable circumstances of this case, was merged into count one, charging bank robbery under aggravated circumstances, so that sentence is permissible under the latter count only.

Point C

Congress, prior to the amendment, provided for a maximum sentence of twenty-five (25) years for the acts prohibited in 12 U.S.C. 588b (a) and (b), the predecessor statute. The amendment was not intended to provide for more severe punishment for the commission of a typical bank robbery, but to expand its scope to include burglary and larceny, burglary being deemed to include peaceable entry with intent to commit a felony or larceny. The reenactment must be interpreted in the light of such Congressional intent, and in view of its purposes as evidenced by the earlier statute. If the aggravated portion of the reenactment is charged, the lesser crimes charged in subsections (a) and (b), particularly subsection (a), are merged therein so that a maximum sentence of twenty-five (25) years only is imposable.

Subsections (a) and (b) of the earlier statute provided in substance certain punishment for robbing a bank by force and violence or putting in fear, and provided for a heavier punishment, referred to as the aggravated or jeopardy portion of the statute, if the robbery is accomplished or attempted with the use of a dangerous weapon or device. The entry of intent offense was part of subsection (a). The reenactment provides for bank robbery by force and violence or putting in fear and entry with intent in subsection (a) thereof, and the aggravated or jeopardy portion thereof is found in subsection (d).

The courts have interpreted these provisions to mean

that if the crime is committed under aggravated circumstances, an indictment charging bank robbery by force and violence in one count and under aggravated circumstances by the use of a dangerous weapon or device in another count, the first count is deemed to merge in the second count, so that the twenty-five (25) year sentence imposable on that count is the maximum punishment assessable. These courts hold that the Congress did not intend to define two separate offenses, but only one offense, either aggravated or not aggravated.

The courts have displayed definite hostility and aversion to sentence imposed on both subsection (a) and (b) of Sec. 12 U.S.C. 588b, now 12 U.S.C. 2113 (a) and (d). *Ward vs. United States,* 183 F. 2d 270 (C.A. 10); *Gant vs. United States,* 161 F. 2d 793 (C.A. 5); *O'Keith vs. United States,* 158 F. 2d 591; *Vautrot vs. United States,* 144 F. 2d 740; *Barkdoll vs. United States,* 147 F. 2d 617 (C.A. 9); *McDonald vs. Johnson,* 149 F. 2d 768 (C.A. 9); *Crum vs. United States,* 151 F. 2d 510 (C.A. 9); *Hewitt vs. United States,* 110 F. 2d 1 (C.A. 8); *Wilson vs. United States,* 145 F. 2d 734 (C.A. 9); *Gebhart vs. United States,* 163 F. 2d 962 (C.A. 8); *McDonald vs. Moinet,* 139 F. 2d 939 (C.A. 6); *Price vs. United States,* 193 F. 2d 523 (C.A. 6); *Coy vs. Johnston,* 136 F. 2d 818 (C.A. 6); *Heflin vs. United States,* 223 F. 2d 371 (C.A. 5); and *Simunov vs. United States,* 162 F. 2d 314 C.A. 6).

The view of these courts is well expressed in *McDonald vs. Moinet,* supra, wherein it was observed:

> "It is true that the original sentence was void, for the reason that the offense of bank robbery by the use of deadly weapons as defined in 12 U.S.C.A. Sec. 588b (b) is the same offense as described in 588b (a) aggravated by the use of a deadly weapon. The Congress not being deemed by the courts to have intended to

> define two separate offenses, but only one offense, either aggravated or not aggravated."

The court further states:

> "The petition of the government attorney conceded that Walter McDonald could properly be sentenced on only one of the counts of the indictment and that the maximum sentence provided under Title 12, Sec. 588b is twenty-five (25) years."

The language and holdings in these cases are unequivocable and indicate no question as to the premise as to the premise that violation of Sec. 588b (a) and (b), now Sec. 2113 (a) and (d), permits a maximum penalty of twenty-five (25) years only, which would include the entry of intent offense. In these cases the clear intent of the legislature when it enacted the amendement is not being ignored or violated in the least.

However, diligent and possibly over-zealous prosecutors have tried to obtain a separate conviction and sentence on the entry with intent provision as in the case at bar.

The Fifth, Sixth and Ninth circuits have met the question squarely, but without reference to the legislative history of the amendment or its evident purpose, and have arrived at different conclusions, all based on the doctrine of merger.

The Fifth Circuit Court of Appeals, from which this case was appealed, is unequivocably committed to the view that entry with intent is a separate crime, and only one of the progressive stages of a typical bank robbery, and that the court is empowered to impose separate sentences for the crime of bank robbery by force and violence, aggravated or not, and the crime of entry with intent. *Durrett* v. *United States,* 107 F. 2d 438; *Wells* v. *United States,* 124

F. 2d 335; *Wells* v. *United States,* 210 F. 2d 112; *Prince* v. *United States,* 230 F. 2d 568.

In the *Durrett* case, the Court indicated that if jeopardy was shown, both in entering the bank and in committing the robbery, there would be a merger which would then permit a maximum sentence of twenty-five (25) years, even if robbery by force and violence and entry with intent are separate crimes.

This Court, in *Holiday* v. *Johnston,* 313 U. S. 342, 61 S. Ct. 1015, had before it the question of whether or not the lower court had followed the correct procedure in setting aside a sentence on both 588b (a) and (b). The lower court elected to set aside the lighter sentence, holding that only one sentence was created by these sections. This Court, in approving the procedure, stated in its opinion that Sec. 588b (a) and (b) did not create separate crimes, but merely prescribed alternate remedies for the same crime. Although this statement appears to be dictum, this case has been cited as authority for the proposition in numerous other cases.

In other words, the crime committed in Sec. 588b (a) is merged in the crime prohibited by Sec. 588b (b). Under this doctrine, a merger could be effected in the case at bar since violation of Sec. 2113 (d), the reenactment of Sec. 588b (b) is charged in addition to one of the offenses defined in subsection (a).

However, the court below adhered to its ruling in the *Durrett* case since no aggravation of the entrance count was charged. Two crimes are recognized as being covered by subsection (a) in both acts, but they can stand together, unless aggravated circumstances are involved. Then either or both appear to be susceptible of merger. See *United States* v. *Durrett, supra.* This position is illogical and con-

fusing because the true purpose of the 1937 amendment has not been clearly understood by the court below.

The Sixth Circuit in *Simunov* v. *United States*, 162 F. 2d 314, and *Price* v. *United States*, 193 F. 2d 523, struck down that portion of the sentence imposed on the intent count.

In the *Simunov* case the defendant was convicted under an indictment containing four counts charging defendant with entering a bank to commit a felony (588b (a), 2113 (a)), stealing from the bank (588b (a), 2113 (b)), putting the life of a bank officer in jeopardy (588b (b), 2113 (d)), and attempitng to avoid apprehension by forcing a bank official to accompany him without the consent of such official. The trial court sentenced him to sixty-five (65) years plus twenty-five (25) years for kidnapping. The sentence was held to be ambiguous and to require correction. It was observed by the court:

> "It is now settled that the statute dealing with the offense of bank robbery creates but a single offense with various degrees of aggravation, permitting sentences of increasing severity * * *. The case is remanded to the district court for the correction of sentence by the imposition of a sentence for not more than 25 years."

In *Price* v. *United States, supra,* also a Sixth Circuit case, decided in 1951, the defendant was originally sentenced on four counts to a total of sixty-five (65) years. One of the counts charged entry with intent. The court, in a *Per Curiam* decision, found this sentence to be clearly erroneous for reasons stated in *Simunov* v. *United States, supra.* The district judge dismissed two counts of the indictment and sentenced defendant to twenty (20) and twenty-five

(25) years respectively on the other two counts to run concurrently. This procedure was approved. The court said:

> "It thus appearing that the total punishment imposed did not exceed the permissible limit in one of the counts and it being the evident intention of the re-sentencing judge that the prisoner should serve the *full limit permissible by the statute* (italics mine) obviously appellant has not been prejudiced by the technical error of re-sentencing."

The latest decision prior to that in the case at bar on this point was decided, coincidentally, by the Fifth Circuit from whence this appeal has arisen, in *Heflin* v. *United States*, 223 F. 2d 371. In this case the defendant was convicted on five counts relating to the robbery of the bank and five sentences were imposed so as to run consecutively for a total of twenty (20) years and two (2) days. Count one charged a violation of 18 U.S.C. Sec. 2113 (a), charging that Heflin feloniously and by force and violence, took from the person and presence of a bank employee a certain sum of money. Count two charged violation of subsection (b) of the statute, taking and carrying away such money with intent to steal. Count three charged violation of subsection (d), taking such money from the person and presence of a bank employee, and in so doing, assaulting certain named persons with a revolver or pistol. Count four charged violation of subsection (c), receiving, concealing, storing and disposing of said money, knowing it to have been taken from a member bank of the Federal Reserve System with intent to steal. Count five charged conspiracy to violate the above sections and the overt act of taking the money.

The court held that subsections (a), (b) and (d) of the statute relating to bank robbery do not create separate offenses, *but only different maximum punishments for a*

single offense, depending upon existence of aggravating circumstances, and therefore only a single sentence should have been imposed under separate counts charging violation of these respective subdivisions, and *that sentence should not have exceeded a $10,000 fine and twenty-five (25) years imprisonment.*

Clearly, the court was of the opinion that when aggravating circumstances are present, those crimes committed under subsections (a) and (b) of the statute are then merged in that crime prohibited in subsection (d). In the case at bar, entry with intent, a subsection (a) crime, was deemed not to be merged by the court below, contrary to the holdings of the other circuits that have considered this precise question, and its own holding in the *Heflin* case.

In disposing of its decision in the *Heflin* case, decided less than eight months prior to its decision in the case at bar, the court states in its opinion (R. 13):

> "The problem usually arises, as it is presented here, when two crimes defined in (a) or (b) are alleged and it is further alleged that one of them was done in the aggravated manner defined in (d). Obviously under the authorities just cited, the act made criminal in (a) and (b), which is performed in the aggravated manner described in (d), is merged with the latter offense. Is the other subsection (a) or (b) crime also merged? The answer is unquestionably no. In *Heflin vs. United States* (5 Cir.), 223 F. 2d 371, we reached the opposite conclusion, because the government there conceded the point and agreed to a corresponding modification of Heflin's sentence, but we do not wish that case to stand as authority for the view that in this respect the sentence was illegal. It was illegal in another respect, however, and was properly reversed as to one of the counts in that it committed Heflin for both robbery as

defined in (a) and an aggravation of the same offense under (d)."

In the Ninth Circuit in *Wells* v. *Swope*, 121 F. Supp. 718, reversed on other grounds, *Madigan* v. *Wells*, 224 F. 2d 277, two district judges ordered the release of Wells on a writ of *habeas corpus* for the reason that the intent count was deemed to be merged in the aggravated count. The Ninth Circuit Court of Appeals in the *Madigan* case, although not clearly delineating its reasons, indicated its acceptance of this view.

The question is thus posed: When an act made criminal by Section 2113 (a) or (b) is committed in the aggravated manner prescribed in (d), is the subsection (a) or (b) crime merged with the latter offense? Under the authorities, as the court below properly points out, the answer is unquestionably yes. And now the crux of the problem: if *two* crimes defined in (a) or (b) are alleged, and it is further alleged that only *one* of the acts is committed in the aggravated form prescribed in (d), does the act alleged to be committed in the non-aggravated form also merge in (d)?

Petitioner respectfully submits that it does.

The authorities have either construed subsections (a) and (b) of the original act, as amended, and subsections (a), (b) and (d) of the reenactment, either as not creating separate offenses, but only as creating different maximum punishments for a single offense, depending upon the existence of aggravating circumstances, or as creating four separate and distinct crimes.

It thus appears that whichever construction is deemed correct, in view of the intent of Congress, and a fair reading of the statute as amended in 1937, the difference is more technical than real in so far as the final results are concerned.

The petitioner deems it of paramount importance that nowhere in the legislative history of the original act, the amendment and the reenactment, is there even a remote hint that Congress intended the maximum punishment for commission of the acts defined in 588b (a) and (b) and 2113 (a), (b) and (d) to be more than twenty-five (25) years.

Prior to the enactment of the 1937 amendment, subsections (a) and (b) of the Bank Robbery Act prohibited the robbery of a bank by force and violence and provided a more severe sentence if the act is committed under aggravated circumstances. Sentences of twenty (20) and twenty-five (25) years respetcively were provided, and are still provided in the reenactment.

In 1937, recognizing the need for the recommended legislation embracing certain new federal offenses, that of burglary and larceny, Congress added these two crimes to the Act, distinguishing between grand and petit larceny. It seems clear from the Attorney General's letter, submitted bill, the House and Senate reports, and the brief debates thereon, that Congress did not intend to provide for more severe punishment but merely to enlarge the scope of the act to include those crimes it deemed should be embraced by the statute. It left subsection (b), now subsection (d) in the reenactment, intact, so that if any offense defined in subsection (a) of the old act, or in subsections (a) and (b) of the reenactment, are committed under aggravated circumstances, the heavier sentence is imposable. There is little question that the grand and petit larceny provision of the reenactment can be and are merged in subsection (d) thereof. By the very terms of the statute, one or the other is committed; clearly both offenses cannot be committed at the same time, and there will be a merger with (d) of whichever subsection (b) offense is charged if aggravated circumstances are shown.

The problem concerning the offenses described in (a)

would be equally easy of solution if it is recognized that Congress intended two separate crimes, each susceptible of merger into subsection (d) if committed under aggravated circumstances, but had not intended the defined offenses to represent two phases of the act of bank robbery so that each phase is punishable separately. Subsection (d) of the reenactment in referring to any offense defined in subsections (a) and (b) simply means this: If any of the crimes are committed as prohibited in (a), (b) and (d), the twenty-five (25) year maximum sentence is automatically imposable. There is a merger of the acts into subsection (d). It is inconceivable that Congress intended prosecutors be given the opportunity to amass consecutive sentences by the mere expedient of drafting the indictment so that the typical bank robbery is divided into progressive steps, each portion thereof susceptible to a separate sentence.

While the court below cites 18 U.S.C. Sec. 659 and 2117, and the cases of *Greenburg* v. *United States,* 253 F. 728 (C.A. 7) and *United States* v. *Carpenter,* 143 F. 2d 47 (C.A. 7) as authority for the proposition that the various steps of a criminal undertaking may be punished separately, it seems clear that the statute involved in the instant case is unique in that it involves an act not inconsistent with a lawful purpose and engaged in by those millions of persons who daily enter banks to transact lawful business therein. The *animus* must be present and this is generally susceptible of proof only by the actual consummation of the intended felonious act. The act is not criminal *per se* such as tearing open mail bags or breaking the seal on a railroad car.

Otherwise, if the robber enters the bank, commits the robbery under aggravated circumstances, takes and carries away a sum in excess of $100, at least three counts are

ascertained immediately, sentence imposable thereon aggregating fifty-five (55) years. If the entrance is made under aggravated circumstances, and there being deemed to be no merger into subsection (d), the aggregate is sixty (60) years, twenty-five (25) years in each of the aggravated subsection (a) offenses and ten (10) years under the subsection (b) offense.

Under this interpretation of the statute, the aggravated portion thereof simply becomes a means of adding five (5) years to the various counts, instead of providing the maximum as Congress plainly desired it should.

However, no difficulty has arisen concerning the larceny provision. It appears that at least one of the purposes for which the 1937 amendment was designed is being recognized by the courts, namely, to prevent a reoccurrence of the situation described in the Attorney General's letter. The Fifth Circuit Court of Appeals alone has held that the amendment has a broader meaning than widening the scope of the Act and that it covers one stage or phase of the crime of bank robbery so that mere entry and subsequent consummation of the unlawful enterprise are separate and distinct crimes, each punishable by maximum penalty of twenty (20) years imprisonment if committed under non-aggravated circumstances, and twenty-five (25) years if committed under aggravated circumstances. The contention of petitioner and that of the Fifth Circuit are obviously irreconcilable.

An examination of some of the ultimate results which follow adherence to the latter doctrine is interesting and somewhat disconcerting.

In the first place, the courts have often laid down the rule that the maximum sentence assessable under Sec. 588b subsections (a) and (b) and Sec. 2113 (a) and (d) is twenty-five (25) years. See cases hereinabove cited.

Treating the entrance with intent provision as a separate but distinct facet of the typical bank robbery, automatically, and with distressing finality, adds another twenty (20) years, at least, to the twenty-five (25) year sentence. In effect, the statute is being judicially rewritten to provide a maximum of forty (40) years instead of twenty (20) years for violation of subsection (a) of the bank robbery act.

No justification for such interpretation is evident from a clear reading of the statute.

Secondly, the courts have held that irrespective of how many persons were placed in jeopardy, the accused can be sentenced to a maximum of twenty-five (25) years only. *Dimenza* v. *United States,* 130 F. 2d 465 (C.A. 9). However, if the interpretation of the Fifth Circuit is deemed correct, the accused may rob a bank placing twenty persons in jeopardy, and if no intent count is charged, could be sentenced to a maximum term of twenty-five (25) years, since the aggravated or jeopardy section of the statutes would be applicable. The number of persons placed in jeopardy is immaterial. However, if he endangers only one person and the entrance with intent count *is* charged in addition to the aggravated circumstances count, the accused could be sentenced to twenty-five (25) years on the aggravated count, and in addition thereto to a term of twenty (20) years on the entrance with intent count, or a total of forty-five (45) years. He is thus sentenced to a longer term for an act that placed far fewer persons in jeopardy and is, at least in degree, a less dangerous act than the former example, by the simple expedient of adding an intent count to the indictment—the very intent or *animus* that must be present in all felony cases.

The holdings of the court below appear to be indefensible. Suppose the bank robber flourishes his gun and threatens

a bank guard as he enters the bank. That would be entrance with intent under aggravated circumstances according to the Fifth Circuit's view, and subjects the criminal to a maximum term of twenty-five (25) years' imprisonment. Then, the felon threatens a teller with the weapon. This act is covered by the aggravated portion of the statute also and would subject the robber to an additional twenty-five (25) years. Hence, logically, for commission of the two "separate crimes" the robber would be liable to fifty (50) years' imprisonment. Or would he? In *Durrett* v. *United States,* supra, the Fifth Circuit stated as follows, at page 439:

> "With respect to Count Two (intent count) there is no indication of a merger, as there is nothing in the record to show that the appellant put in jeopardy the life of any person by the use of a dangerous weapon or device when he entered the bank with intent to commit a larceny therein; but conceding that he did commit the crime of so entering the bank in an aggravated manner and form demonstrated in subsection (b) of said Sec. 588b, he was not charged therewith in the indictment but was charged with a lesser offense * * * and should not now be heard to say that his offense was more serious than the one to which he plead guilty."

This language indicates that if the entrance were made under aggravated circumstances, the act would merge, along with the crime of actual bank robbery by force and intimidation, into the aggravated portion of the Act which provides for a total of twenty-five (25) years. But there is no merger if the entry is made without aggravated circumstances, so that the accused may be assessed a total of forty-five (45) years instead of twenty-five (25) years. Proof of a more serious crime will subject the defendant to

a lesser sentence. The doctrine, although almost unbelievable, appears settled in the Fifth Circuit. Any doubt that may be entertained as evidenced by the above quoted language is resolved by its statement in syllabus 3:

> " • • • The offense charged in first count (entry with intent to commit larceny) was not merged in the offenses charged in subsequent counts, especially where record did not show that defendant put the life of any person in jeopardy by use of a dangerous weapon or device when he entered the bank with intent of committing larceny therein. • • • "

This last case is commented only to emphasize the confusion that can arise and has arisen because of the failure of the courts, particularly the Fifth Circuit, to recog-- nize the true intent of the legislature in enacting the provision in question herein. Strict interpretation of the act, in conformity with the clear purposes for which it was enacted, would most certainly eliminate to a great extent the present confusion, and which unjustifiably subjects those committing the crime to punishments of varying degrees, depending upon the *situs* of the sentencing court. The actual robbery under aggravated circumstances embraces the entry with intent, since in each case the first crime is always present, and the entry count, as interpreted below, is related to it and depends upon it for its existence and illegality.

If the four different crimes theory is correct, the entry with intent provision clearly is in the nature of a burglary, and Count Two of the indictment herein is void in any event; but if the statute provides for one offense with different degrees of aggravation upon which the severity of sentenec is dependent, the ultimate sentence in point of severity is twenty-five (25) years, and Count Two of the

indictment would necessarily merge into Count One which is susceptible to the maximum sentence. It is respectfully pointed out that the syllabus numbered three in *Holiday* v. *Johnston,* supra, contains the following language which is peculiarly apropos to the case at bar:

> "Where defendant pleaded guilty to count charging robbery of an insured bank and count for jeopardizing lives of the bank officials and was sentenced to ten (10) years under the first and to fifteen (15) years under the second count, to run consecutively * * * the statute under which prosecution was brought did not create two separate crimes but merely prescribed alternative sentences for the same crime. * * * "

The court further states:

> "The respondent admits that Section 2 of the Act of May 18, 1934, supra, does not create two separate crimes, but describes alternative sentences for the same crime, depending upon the manner of its perpetration."

If it is held that both of the acts prohibited in subsection (a) of the reenactment do not merge in (d) thereof when aggravated circumstances are present, then the maximum under the Act will always by at least forty-five (45) years if such circumstances are present instead of twenty-five (25) years since entry with intent to commit a felony therein will necessarily be one of the steps of any bank robbery taking place within the premises unless a bizarre and unlikely set of facts are developed.

Such entry with intent will necessarily also be a part of the acts of grand and petit larceny prohibited in subsection (b). Thus, if a person carries away a sum of less than $100 under that subsection, he can be sentenced to a term of

one year for the petit larceny and twenty (20) years for the entry of the bank with intent to commit a felony therein. It becomes a felony to enter with intent to commit a misdemeanor. It is inconceivable that Congress ever intended such an incongruous result. Certainly, the Attorney General did not so visualize this result when he merely requested that the Act be expanded to include burglary and larceny.

Under the doctrine laid down in *Jerome* v. *United States*, 318 U.S. 101, 63 S. Ct. 483, 87 L. Ed. 640, the statute making it a Federal offense to enter or attempt to enter a bank with intent to commit a felony therein, includes only those Federal felonies which affect a bank protected by the Act. Therefore, again it is made clear that when one of the acts prohibited in these subsections is committed within the bank, as occurs in practically all bank robberies, entrance with intent will necessarily be a part of the unlawful enterprise, and simply supplies a handy and simple expedient of possibly doubling the otherwise permissible sentence. All such acts, which are part of the whole, the whole being the actual bank robbery, become part of the whole for the purpose of sentence.

It is submitted that all subsection (a) and (b) offenses are deemed to be merged in the aggravated count when it is charged. When the aggravated count is not charged, then it appears that only one of the lesser crimes in (a) and (b) of the reenactment can stand unless a true burglary is committed. Otherwise, the prosecutor is again given a handy expedient in that he can draft his indictment so that it charges non-aggravated offenses, thus gving him the opportunity to obtain a sentence on three of the four offenses defined in subsections (a) and (b), namely, robbery by force and violence, entry with intent, and either grand or petit larceny, with a possible maximum sentence aggregating fifty (50) years.

It is respectfully urged by petitioner that the rights and liberties of individuals should not be dependnt upon the ingenuity of the prosecutor in manipulating the subsections of the statue so as to obtain the maximum possible under the facts of the particular case. It is submitted that the simple example given probably covers the fact structures contained in a great majority of the bank robberies. Instead of following the clear intent of the Congress to provide a maximum sentence as set out in subsection (d), the prosecution will become a travesty and more in the nature of a game rather than a bona fide effort to sentence a felon to a term consistent with that intended by Congress he should serve.

This pyramiding of offenses is precisely what happened in the case at bar and similar cases in the Fifth Circuit. *Durrett* v. *United States, supra.* Congressional intent urging interpretation of the statute under the merger theory so as to limit the maximum sentence under subsections (a), (b) and (d) to the maximum prescribed in the latter subsections appears clear and persuasive and should be given great weight by the Court.

Point D

Even if the act or transaction herein involved violated two distinct statutory provisions and irrespective of the intent of the Congress in enacting the amendment of 1937 to the bank robbery statute, it is clear that the acts herein complained of constituted only one crime for the purpose of sentence.

The rule invoked herein was adequately expressed in the early bank robbery case of *Hewitt* v. *United States, supra.* The indictment therin contained two counts. The first count charged the defendant with having forcibly robbed the bank; the second count charging that while committing

the robbery he put the lives of persons in jeopardy by the use of dangerous weapons. These counts charged violation of 12 U.S.C. 588b (a) and (b), now 18 U.S.C. 2113 (a) and (d). The defendant was given the maximum sentence prescribed by law for each violation—twenty (20) years on the first count, and twenty-five (25) years on the second count, to be served consecutively. On appeal the prisoner contended that the court erred in imposing a sentence under each count to be served consecutively, and that no sentence should have been imposed upon the first count for the reason that the robbery of the bank did not constitute two separate crimes for the purpose of punishment.

Without reference to the merger theory, the court sets forth the rule which is applicable to the case at bar. At page 10 it states:

> "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether *each* provision requires proof of an additional fact which the other does not."

The court held that the robbery of the bank constituted for the purpose of sentence but one offense and sentence should not have been imposed on the first count of the indictment which was ordered vacated. See also *Gavieres* v. *United States,* 220 U. S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489; *Blockburger* v. *United States,* 284 U. S. 299, 304, 52 S. Ct. 180, 182, 70 L. Ed. 306; *Casebeer* v. *United States,* 87 F. 2d 668, 669 (C.A. 10).

In the case at bar, the record shows that the petitioner entered the bank through a regular entrance, said some words to one of the employees, displayed a dangerous weapon, asked for money, obtained it, and fled. Can it be

said that even if the entry with intent provision is deemed to be a separate crime not in the nature of burglary, and but one phase of a typical bank robbery, and thus applicable herein, that proof of *each* of the two offenses charged will require proof of additional fact the other does not require? The answer must be in the negative.

While proof of the robbery itself requires the showing of additional facts not required to prove the entry with intent, the converse is not true. There are no additional facts necessary to prove the entry with intent. Proof of the robbery under aggravated circumstances will include all proof necessary to prove such entrance. Intent is shown by commission of the act; entrance is proved by showing where petitioner was when he displayed the dangerous weapon. Every case of a robbery of a bank under the facts of this case will necessarily include entrance with intent.

Perhaps it may be argued that the first part of subsection (a) of both the earlier statute and the reenactment does not require that the act therein prohibited take place inside the premises of the bank or savings and loan association, and that since the entry with intent provision by its terms clearly requires such entry, the additional fact is developed bringing these two crimes within the rule. Each offense thus requires proof of an additional fact that the other does not. But see *Durrett* v. *United States, supra.*

To indiscriminately and academically apply the rule herein would work an injustice and would have to involve a total disregard of the facts in this case which show a typical bank robbery, which must necessarily include proof of entrance with intent.

Petitioner submits that under the facts of this case, even if the intent of the legislature is deemed broader than pointed out in Point A, the robbery of the bank, for the purpose of punishment, did not constitute two separate crimes.

Conclusion

Therefore, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed and this cause remanded with instructions to vacate or expunge the fifteen (15) year sentence imposed upon Count Two of the indictment herein involved.

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